Jesabena Sdn. Bhd. v. Beh Heng Poo & Anor. [1985] 1 MLJ 394 at 396 F and G in the following terms:

> Before concluding, I have an observation to make, and it is this: Counsel for the respondents when he raised the preliminary objection herein, did so without any prior notice to his opponent. This was unfortunate and I would echo the practice advocated by Thomson CJ in *Gurbachan Singh v. Seagrott & Campbell* that when points such as this are proposed to be taken, notice in writing of an intention to do so should be given at the earliest possible moment to the other side who otherwise might be taken by surprise.

I would add that, in certain circumstances, failure to give notice as aforesaid, could amount to a waiver of an irregularity. It is otherwise where the point taken, if valid, results in a nullity, since a nullity is incapable in law of being waived.

I am now prepared to hear arguments as to costs.

STRAITS VIEW HOTEL SDN. BHD.

v.

TAN AH PENG & ANOR.

HIGH COURT, JOHORE BAHRU
DATO' V.C. GEORGE J.
[CIVIL SUIT NO. 22-103 OF 1992]
11 SEPTEMBER 1993

CONTRACT: Tenancy in hotel premises - Alleged representation by owners of hotel to give an extension to term of tenancy - Burden of proving the representation.

This was a claim by plaintiff (P) for vacant possession of a part of the Straits View Hotel which was rented out to the company Jaw Five Restaurant Sdn. Bhd. of which the 1st defendant Tan was the managing director. The plaintiff also claimed damages for holding over, interests and costs.

The dispute arose in relation to the period of tenancy pursuant to a tenancy agreement (the tenancy) entered into with Tan on 5 December 1985 which tenancy was later assigned to the 2nd defendant, a company incorporated by Tan. The tenancy was for a term of 3 years. However Condition 31 of the tenancy gave the tenant an option to renew the tenancy for a further period of 3 years by way of a written notice to P.

The defendants exercised the option when the first 3 years expired. Subsequently when 6 years was almost up, Tan wrote to P asking for a further term or extension of 3 years. The request was denied and eventually this suit was brought.

The defence turned upon an alleged oral representation by one Dato J.C. Chang whose parent company J.C. Chang (Pte) Ltd. owned the hotel. Tan alleged that a promise was given at the outset that a total term of 9 years tenancy was assured and upon the faith of this assertion Tan entered into the tenancy and expanded money in renovations. Tan apparently accepted Chang's explanation for excluding the extension in the tenancy on the grounds that the property had only 1 title and therefore such an inclusion was not allowed. He testified that a term of only 3 years with an option of another 3 would not have been a feasible project in his mind and would have been rejected by him.

The plaintiff denied that the said representation was given or that a collateral contract existed.

Held:

[1] The party who asserts that an oral representation was given on a contract bears the burden of proving the same was in fact made. On the totality of the evidence and the authorities on the point, the defendants have failed to discharge this burden.

[2] The 1st defendant's assertion that he accepted Chang's excuse for not including a total 9 year period in the tenancy is not plausible in view of the fact that the 1st defendant is a successful businessman and could not have exhibited such gullibility on his part.

The 1st D had also executed a guarantee for P which would have in all probability covered the alleged extension; if so granted. However, the guarantee makes no mention of it. The letters from the defendants asking that the 6 year tenancy be further renewed were also worded in a manner which did not imply an oral representation had earlier been given on the extension.

Contemporaneous documents are vital in establishing the existence and/or terms of an oral promise or representation and in this case the documents have failed to establish that there was any representation of an oral nature or that there was in existence a collateral agreement.

[3] The turnover of the 2nd defendant was such that the capital outlay would have been recouped in 2 years or so. It is therefore difficult to be convinced by the testimony that the project would not have been feasible if the tenancy was intended for 6 years only.

[Judgment for plaintiff for vacant possession. Consequential orders made. Issue of liability for and quantum of damages to be tried on dates to be fixed].

Cases referred to:

E & O Hotel v. E. George Fernandez & Ors. [1987] 1 MLJ 35 ***(refd)***

Tan Sri Khoo Teck Puat v. Plenitude Holdings Sdn. Bhd. [1993] 1 AMR 16 ***(refd)***

For the plaintiffs - Cyrus V. Das (K.V. Lim & Steven Thiru with him); M/s. Iqbal Hakim & Voo

For the defendants - R.R. Sethu (Michael K.H. Lim with him); M/s. R.R. Singham & Lim

JUDGMENT

V.C. George J:

J.C. Chang (Pte) Ltd. is the flagship of a group of companies in Singapore and in Malaysia under the leadership of one Dato' J.C. Chang of Johore Bahru. One of the companies in the group is the plaintiff.

J.C. Chang (Pte) Ltd. owns the Straits View Hotel which is situated on the hill at Jalan Scudai, Johore Bahru, with a vantage view of the Straits separating Johore from Singapore. The owners of the hotel had rented it out to its sister company, the plaintiff, fox fixed periods of time which have been renewed or extended from time to time over the years. The hotel has been functioning as such for about 30 years. In 1986 the owners let the hotel to the plaintiffs for a fresh term of 3 years with an option to renew the tenancy twice for terms of 3 years each.

Earlier, on 5 December 1985, the plaintiffs (with the consent of J.C. Chang (Pte) Ltd.) entered into a written tenancy agreement with En. Tan Ah Peng, the 1st defendant, in respect of portions of the hotel which portions included a part of the ground floor of the hotel building and a vacant area overlooking Jalan Scudai and the straits. The tenant was expected to carry out certain renovation works. The period of the tenancy is expressly provided in the agreement to be 3 years commencing from 1 May 1986 "or the date of completion of the renovation ... whichever is the earlier" at a monthly rental of RM7,500 for the 1st and 2nd years and RM9,500 for the 3rd year. The 1st defendant was granted a "grace period" of 180 days, during which period rent was not payable, "to enable the tenant to carry out renovation work".

It is a common ground that the parties understood that the "renovation" consisted not only of the actual renovation of portions of the hotel building included in the tenancy but the erection of pavilions on the grounds of the hotel. It is common ground that the tenant was to operate a seafood restaurant in the demised area. It was specifically agreed that it was the responsibility of the tenant to obtain the approval of the authorities "for the renovation works".

Condition 20 of the Special Conditions to the agreement provides that all renovations including alterations, extensions and additions and fittings and fixtures attached to the demised premises shall be left behind by the tenant at the

end of the tenancy. Condition 31 of the Special Conditions which gives the tenant an option to renew the tenancy is reproduced in full:

> 31. The tenant paying the rents hereby reserved and performing and observing the several covenants and agreements herein contained and on the tenant's part to be observed and performed shall have the option to renew this tenancy for a further period of three (3) years only whereby the monthly rental for the first year be for the sum of Dollars Nine Thousand Five Hundred (RM9,500) only and the monthly rental for the second and third year be not more than dollars Twelve Thousand (RM12,000) only and save for this renewal clause, upon the same terms and conditions herein contained Provided Always That such option shall be exercised by way of a written notice to be given by the tenant to the landlord of its intention to renew the tenancy not less than six (6) months before the expiration of the tenancy.

The tenant was required to deposit RM57,000 with the landlord as a security deposit as follows: RM22,500 upon execution of the tenancy agreement, another RM22,500 at the commencement of the 2nd year of tenancy and the balance of RM12,000 at the commencement of the 3rd year of tenancy. It was anticipated that Tan Ah Peng would as soon as possible incorporate a company to run the seafood restaurant and that the tenancy agreement would be assigned to this company on incorporation. This was eventually effected with the knowledge and/or consent of the plaintiffs. The tenancy was assigned to the new company the 2nd defendant of which Tan Ah Peng was and is the Managing Director

The defendants contend that the plaintiffs had through its Chairman Dato' J.C. Chang given an oral promise or had made representations to the 1st defendant that the plaintiffs would grant the 1st defendant (his assignees and successors) a tenancy for a total period of 9 years made up of a first term of 3 years to be followed at the option of the 1st defendant or his assignees of two further terms of 3 years each and that it had been on the "faith and in reliance upon the said representation, promise and assurance" that the 1st defendant had entered into the tenancy agreement and that the 2nd defendant had later accepted the assignment thereof.

The plaintiffs deny this contention of the oral promise and/or representation as alleged or at all and contend that the period of the tenancy was as stated in Condition 31 of the Special Conditions that is for a maximum period of 6 years.

After the 1st 3 years the 2nd defendant did exercise the Special Condition 31 option (on being reminded to do so by the plaintiffs). Just before the expiry of the 6th year of tenancy the 2nd defendant wrote to the plaintiffs expressing a desire to renew the tenancy. The plaintiffs replied saying that they were not interested to renew or give an extension and they gave notice to the defendants to give up vacant possession on the expiry of the 6th year. When the defendants failed to do so the writ herein was caused to be issued seeking vacant possession and damages for holding over, interests and costs.

The case turned on whether there was such oral promise or representation given or made by the plaintiffs through Dato' J.C. Chang. Did the facts as alleged by the defendants occur and if so did it give rights, did it give rise to an equity.

Since it is the defendants who say that there was such an oral agreement or representation, I ruled that the burden of proof of that allegation is on the defendants and on the issues of the case as presented, it is for the defendants to begin. It was decided that initially the issue of liability be tried and the issue of damages be tried only if such a trial becomes relevant.

After a lengthy trial in which a number of witnesses had testified and I had the benefit of the research and submission of leading Counsel assisted by able juniors, I found on 28 April 1993 in favour of the plaintiffs and ordered that vacant possession be given within 30 days of the decision. I also ordered that the costs of and incidental to the action be paid by the defendants. I directed that the issue of liability in respect of the alleged loss and damages and the quantum thereof and the costs of the trial of those further issues, be tried by me on dates to be fixed by the Senior Assistant Registrar.

I now give the grounds for my decision.

The express term in the written tenancy agreement in respect of the period or term of the tenancy is clearly for an initial period of 3 years with an option to the tenant to renew the tenancy for a further maximum period of only 3 years. En. Tan Ah Peng's explanation for

executing the agreement with provision for only 6 years of tenancy and not 9 years is that Dato' J.C. Chang had told him that because the property had only one title it is not possible to provide in the written agreement that the tenancy is to be for a maximum of 9 years. That explanation makes no sense. Having seen and heard En. Tan Ah Peng testify it became obvious that he is not English educated and perhaps only had a few years of education in Chinese school. However there was no doubt that at the time the alleged explanation was given to him by Dato' Chang he was a successful businessman and had been so for a good number of years and had been involved in other tenancy agreements, and because of *inter alia* that, I found it difficult to accept that he would have "bought" such an explanation. He had in fact testified that Dato' Chang had not been clear in respect of the reason given for not including the extra 3 years in the written agreement. En. Tan Ah Peng's testimony was that he had been warned by his brother that he has to be careful in doing business with Dato' J.C. Chang; he had in effect misgivings about the oral promise of the extra 3 years as manifested by his testimony that he had asked the plaintiff's then Manager Gun and the lawyer Yap whether it was safe to sign the agreement, whether Dato' J.C. Chang could be trusted. Tan had testified that neither he nor his brothers, the other shareholders in the 2nd defendant company, would have been interested to enter into the agreement if it was not for 9 years. In all the circumstances I found it difficult to accept that had the alleged explanation been given, En. Tan Ah Peng would not have made enquiries to find out whether the alleged explanation given by Dato' Chang was *bona fide,* plausible and acceptable. And if he had made such enquiries he would have realised that Dato' Chang (if in fact he had given that explanation) was "pulling a fast one".

Tan had, according to him, been all along conscious of there being only the oral promise for the extra years (which had been, according to him, repeated by Chang and/or his operatives from time to time) and had gone along with requests for unreasonable payments to ensure that the oral promise for the extra 3 years would be kept. In the face of all that I would have expected that his letter AB61 of 21 October 1991 written on behalf of the 2nd defendant seeking the renewal of the tenancy to have made at least some reference to the alleged oral promise, if not a demand for the alleged agreed further 3 years. AB61 does not do anything of the sort. It simply expresses a "desire" to renew the tenancy. The plaintiffs' reply dated 21 January 1992, AB62, was that it had no intention of extending or renewing the tenancy beyond the 6th year. The reply to that by the defendants is AB63 dated 10 February 1992 written by solicitors on the instruction of the defendants. En. C.V. Das of Counsel for the plaintiffs was able to submit without fear of contradiction "'that every paragraph, every word of AB63 contradicts the main points of the defendants' case on the pleadings and (as given) in evidence".

The evidence given on behalf of the defendants was that their solicitors before the letter AB63 had been written were fully briefed on the circumstances in which they had agreed to enter into the tenancy agreement including the fact of the oral promise of a total of 9 years of tenancy. If there was that promise as alleged the defendants would have *ab initio* taken the position that they now take that they were entitled as of right to a further 3 years. The written refusal AB62 to give any extension after the 6th year and the demand by the plaintiffs in their letter of 21 January 1992 for vacant possession on the expiry of the 6th year of tenancy should have, it seems to me, resulted in a strongly worded reprimand for the breach of promise on the part of the plaintiffs coupled with the impertinent demand for vacant possession. However, what in fact the solicitors wrote as instructed by the 2nd defendants - a copy of it was contemporaneously extended to the 2nd defendants - was a plea seeking the "kind indulgence" to extend the tenancy, not for the alleged promised 3 years on the faith of which the 1st defendant says he had entered into the agreement, but for 2 years "on humanitarian grounds"!

In respect of establishing the existence and/or terms of an oral promise, or of oral representations and warranties, contemporaneous documents become very important. In *E & O Hotel v. E. George Fernandez & Ors.* [1987] 1 MLJ 35, the first respondent had alleged that he had been induced by false and fraudulent representations by solicitors acting for the appellant to vacate a shop. The defendants had denied that any such representations had been made. The 1st respondent had testified that he had informed his solicitors of the representations after he was served with a notice to quit in terms

contrary to the representations that were made. However, his solicitors in their letter in response to the notice to quit made no reference to the alleged representations which resulted in the Supreme Court holding that the trial Judge who had found that the alleged representations had been made, had failed to consider the relevancy of contemporaneous documents in arriving at that finding of fact. The Supreme Court went on reverse that finding of fact in respect of whether the alleged representations had been made. The Supreme Court found favour with the English view on the point - see page 37A of *E & O Hotel*:

> We would respectfully agree with the soundness of the observation made in *Armagas Ltd. v. Mundogas SA (The 'Ocean Fros')* [1985] 1 Lloyd's Rep 1 which reads:
>
> > It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents to the witnesses' motives, and to the overall probabilities can be of very great assistance to a judge in ascertaining the truth.

The importance of testing the alleged oral representations against contemporaneous documents was also pointed out recently by the Supreme Court in *Tan Sri Khoo Teck Puat v. Plenitude Holdings Sdn. Bhd.* [1993] 1 AMR 16.

Testing the alleged oral promise and representations that Dato' J.C. Chang is alleged to have made against the letters AB61 and 63 it is difficult to see how I could possibly hold that Dato' J.C. Chang had warranted and had represented to the 1st defendant that the lease would be for 9 years as alleged and contended in paragraph 6(b) of the statement of defence or at all. I found it equally difficult to find that there was a collateral contract as alleged or contended in paragraph 10 of the statement of defence.

Now it has been seen that En. Tan Ah Peng had testified that he had finally, *albeit* reluctantly, agreed to the written agreement stating that the term of the tenancy was 3 years with an option to renew for only another 3 years but with the oral promise that he had a further option of renewing for yet another 3 years.

However, when he eventually went to the solicitors' firm to execute the agreement, according to En. Tan Ah Peng, he asked the lawyer whether the 9 years was included in the agreement. If in fact there had been discussions and negotiations in respect of the extra 3 years and if in fact Dato' J.C. Chang had promised the extra 3 years but had said that it would not be a term in the written agreement but that En. Tan should trust Dato' Chang to keep his oral promise and if in fact it was on the faith of that solemn promise that En. Tan Ah Peng had gone to the lawyers' office to execute the tenancy agreement, it seemed to me odd as I had observed to Counsel in the course of the trial, that En. Tan Ah Peng should ask his solicitors whether the agreement states 6 years or 9 years.

Another and more telling point that militates against accepting the 1st defendant's contention that there had been that oral promise of an extra 3 years is the fact and the terms of the guarantees that the plaintiffs had insisted on being provided.

It was understood from the inception that-the real tenant would be the company to be incorporated that is, Jaws Five Restaurant Sdn. Bhd. Pending the incorporation it was agreed by the parties that the tenancy would be in En. Tan Ah Peng's name. Although it was obvious that this would be only for a short period, the plaintiffs had insisted on En. Tan Ah Peng providing the plaintiffs with a letter of guarantee, which Tan Ah Peng did by getting his brothers to guarantee the payment of the agreed rent and the due observation of the terms and conditions of the agreement by the tenant.

The period of the guarantee was stated in the letter of guarantee to be "only for a space of 3 years from the date hereof (both the tenancy agreement and the letter of guarantee were dated 5 December 1985) and shall cover the extended period of 3 years should the tenant exercise the option ..."

On the assignment of the tenancy to the 2nd defendant the earlier guarantee given by En. Tan Ah Peng's brothers ceased to be of effect. However, En. Tan Ah Peng himself then by a letter of guarantee dated 28 May 1986 guaranteed the payment of rent and due observance of the terms and conditions by the assignee the 2nd defendant, the guarantee to "continue only for the space, of all the unexpired residue of the said term of 3 years from 5 December 1985 and shall cover the extended period of 3 years should the assignee exercise the option ..."

I found myself in full agreement with learned Counsel for the plaintiffs that had there been the promise of a further 3 years and even if, there was some legal impediment to including such a term in the tenancy agreement, the probabilities are that the guarantee would have been worded to cover any further extension after the first 6 years.

About the strongest point relied on by the defendants in support of their contention that they had a second option to extend the tenancy to get an aggregate of 9 years was that Tan Ah Peng and his brothers in directing their minds to the matter were of the opinion that considering the large amount that they had to invest in the project it would not be a commercially feasible project unless they were ensured of a tenancy for 9 years. Going by what the defendants say they expected to spend and did spend that is, some RM600,000 to RM700,000 (I pause to note that they had failed to prove that they had spent anything like that amount in setting up the restaurant) and even if the defendants had not expected the venture would be as successful as it turned out to be, it seems to me that it would have been reasonably obvious to the defendants that they would have got back their investment (even assuming that it was, say, RM600,000) in a couple of years or so.

According to Tan Ah Peng, the turnover in the 1st year of operation was about RM300,000 per month. In the 2nd year RM350,000. I think it was ludicrous for Tan Ah Peng to expect anybody to accept his testimony that the profits they made were only RM10,000 to RM40,000 on a turnover of RM300,000 to RM350,000. Even if the profit was only, say, 20% of the turnover the monthly profit would have been in the region of RM60,000. And even if the defendants had only estimated that the turnover would be in the region of, say, RM150,000 a month to give a profit of about RM30,000 a month they could have seen as I have no doubt they did, that they would have recouped their capital outlay in two years or so. I found it difficult to accept that the brothers Tan were of the opinion that unless they had a 9 years tenancy the project was not a feasible one.

On the totality of the evidence and the legal authorities it was my finding that no oral promise as alleged had been made and that there was no oral collateral agreement as alleged. I also found that no facts have been proved that entitled the defendants or either of them to raise any equitable estoppel or any equity in favour of either of the defendants.

Judgment had to be and was entered in favour of the plaintiffs for vacant possession and consequential orders were made. I directed that the issue of liability for and quantum of damages be tried by me on dates to be fixed by the Senior Assistant Registrar.